

No Guarantees

Hello Sezzers,

How do you talk to your clients about the lack of surety or guarantees in our field? Even if you have the right facts, a motion may fail on a technicality, the jury could believe the other side, etc.

The first substantive paragraph in my retainer agreement is (in bold): "**WE CANNOT AND DO NOT GUARANTEE RESULTS.**"

Suzanne L. Hawkins, South Carolina

I tell clients that the best case there is has a 90% success likelihood in court. Never 100%. And most cases go down from there. Judges and juries just do some crazy things.

Shell Bleiweiss, Illinois

If a client has a strong case, I tell them that the prospects are good, but that law is a human process and nothing is guaranteed. Sometimes, depending on the prospects, I will tell clients that I can't rule out a positive result, but an adverse one is definitely possible.

Bert Krages, Oregon

As my former boss used to say, "I've seen sure winners lose, and sure losers win."

I've probably given that warning to clients as many times as I heard him say it, over the years.

Timothy A. Gutknecht, Illinois

I do two things:

My representation agreement contains the following language: "Of course, I cannot make any promises or guarantees about the outcome of any matter..."

Second, when discussing a matter, I always tell the client that a particular outcome is not a sure thing. If a client opines that we "should" win or a win is a "no brainer" I immediately make it very clear that there is no such thing as a sure thing, and that even when the facts and law seem to be in our favor, the outcome can be a surprise.

Caroline A. Edwards, Pennsylvania

And when I've had a client tell me that something is a "sure thing" I remind them that if it was so sure the other side would not be wasting money on it.

David Kaufman, Florida

I always tell my clients there's no guarantees; if it's a strong case I'll opine that it is a good case; but I also point out that litigation is expensive, time consuming, stressful and uncertain; even if it is a strong case it might not go to trial and even if it does, it doesn't mean we will win. Then I tell them a story or two about judges who frankly ignored the law. And I encourage them to keep settlement open.

Ron Jones, Florida

"Litigation is inherently uncertain."

Roger Rosen, California

Ultimately, I think there will be some clients who will never understand that there aren't any guarantees. I have a written disclaimer in my engagement agreement and often will verbally remind the client, but some will just never

get it. Either that or they will conveniently forget that you told them there were no guarantees when they lose their case and try to blame you anyway.

As lawyers, we're trained to think in terms of probability. That's what leads us to always say "It depends" when answering a question. There are certain factors that will increase the probability of one outcome (e.g. plaintiff wins) and certain factors that will increase the chance of the opposite outcome (e.g. defendant wins).

People who don't work in the legal field (i.e. sane people, er, I mean lay people) think much more in binary terms. A lot of my inquiries from prospective clients contain some form of the question "Will this contract protect me from legal liability?" (i.e. a binary yes-no answer) or "What can I do to win my lawsuit?" (i.e. a set list of tasks that if accomplished will guarantee victory).

This probability explanation sometimes works. Depending on who I'm talking to, I will sometimes get even more basic and say something like 'Well, the judge might get in to a fight with his wife the morning of your trial. You never know.'

This isn't easy to do, but what sometimes works is analogize the "no guarantees" thing to a context the listener already knows. I had a guy call me today, for example, looking to sue the Los Angeles County Superior Court because he lost a small claims court case. Based on the conversation, I could tell he was fairly emotional and was not going to understand appeals or immunity issues. I gambled that he was a basketball fan and painted a picture for him of me sitting at home watching an NBA game and cursing at the referees for making lousy calls. I then used that to illustrate how, for instance, the judge could always make a bad call and that could mean he could lose when he really shouldn't.

It sounded like he understood, but you never know.

Andy I. Chen, California

There are so many variables that we cannot control that can determine the outcome of a case, many of which have nothing to do with the merits of the case. Just look at my thread regarding a defendant being forced to disclose LLC members and sub-members in a federal diversity case to aid a plaintiff's claim of diversity. There are so many factors that can influence the outcome of a case that have nothing to do with the actual merits of the case.

Barry Mortge, Illinois